IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ....

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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THE NORTHERN TRUST COMPANY, as Trustee,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Come now the petitioners, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and, for their petition for writ of certiorari, state to the Court that:

(a) No opinion was delivered by the Court of Appeals for the Eight Circuit, upon its dismissal of petitioners' appeal for lack of jurisdiction. The order of dismissal is at p. A-47 in the appendix. The opinion of the District Court on June 10, 1971, denying petitioners' Motion to

Stay Proceedings in the District Court, pending the final adjudication of cause No. 52930 of the Circuit Court of Boone County, Missouri, and the District Court's opinion on June 23, 1971, denying a rehearing on the motion are contained in the appendix at pp. A 13-15 and pp. A 18-19 respectively.

(b) The jurisdiction of this Court is invoked to review an order of July 23, 1971, of the Court of Appeals for the Eighth Circuit, dismissing petitioners' appeal for lack of jurisdiction. The appeal to the Court of Appeals is pursuant to 28 U.S.C. 1292 (a)(1). The petition for writ of certiorari to this Court to review the order of dismissal of the Court of Appeals is pursuant to 28 U.S.C. 1254 (1).

The Court of Appeals order of July 23, 1971, called for its mandate to issue and said mandate so issued. On July 30, 1971, petitioners filed their Motion to Recall and Stay the Mandate, pending petitioners' prompt filing of this petition for writ of certiorari. On August 2, 1971, the Court of Appeals denied petitioners' Motion to Recall and Stay the Mandate.

(c) Petitioners believe this petition comes specifically within the considerations governing review on certiorari, as set forth in Supreme Court Rule 19, in the following ways:

(1) "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;"

Petitioners believe the order of the Eighth Circuit Court of Appeals on July 23, 1971, is in conflict with at least the Second, Fifth and Tenth Circuit Courts of Appeals, in that petitioners' appeal is pursuant to 28 U.S.C. 1292 (a)(1) and meets the requirements set forth in the decision of the Second Circuit in Standard Chlorine of Delaware, Inc. v. Leonard, 384 F2d

304 (1967), which quotes the U.S. Supreme Court's decision in Baltimore Contractors v. Bodinger, 348 U.S. 176, 99 L.Ed. 233, 75 S.Ct. 249, and concludes by saying:

> "And, we agree with the Fifth Circuit that the rule that has emerged from the many decisions is that 'An order staying or refusing to stay proceedings in the District Court is appealable under No. 1292 (a) (1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; **and** (B) the stay was sought to permit the prior determination of some **equitable** defense or counterclaim.' Jackson Brewing Co. v. Clarke, 303 F2d 844, 845 (5th Cir.), cert. denied 371 U.S. 891, 83 S.Ct. 190, 9 L.Ed. 124 (1962) (emphasis in original)."

The Tenth Circuit in Fred M. Hart v. Orion Insurance Co., 427 F2d 529 (1970) has followed Standard Chlorine of Delaware, Inc. v. Leonard.

(2) "Where the court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court."

The Supreme Court in Baltimore Contractors v. Bodinger, supra, interprets such a stay as an injunction within the meaning of 28 U.S.C. 1292 (a) (1) and, therefore, there would be jurisdiction on appeal, as set forth in (1) above.

As summarized in Standard Chlorine, this "Court (in Baltimore Contractors v. Bodinger) analogized such orders to those of a court of equity before the merger of law and equity. It reasoned that a stay of a law type action must be considered equivalent to an injunction staying litigation pending in another court; . . ."

Also, petitioners believe that the criteria for judging whether a particular stay is to be interpreted as an injunction appealable under 1292 (a) (1) should include those situations, where the course of action being pursued by the District Court, and which is sought to be stayed, involves needless friction with the state courts.

Chief Justice Vinson, in his opinion for the Court, in Alabama Public Service Co. v. Southern Ry. Co., 71 S.Ct. 762, has set forth the context in which federal and state court relations should be approached:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts' is convinced that the asserted federal relief cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts . . .
>
> "As this Court held in Great Lakes Dredge & Dock Co. v. Huffman: 'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public inter-

est when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

While the Supreme Court in said quotation is speaking specifically of not enjoining the state court, the Supreme Court is saying that if the federal court does not enjoin the state court, then the federal court will not proceed, but will stay itself and allow the state court to proceed. The situation in this case is more serious, for, as the District Court has found, respondent does not seek to stay the state court proceeding, but the District Court is nonetheless proceeding on the same subject that the state court is proceeding on.

In the circumstances of both the federal and state courts proceeding on the same subject, a request for the federal court to enjoin the state court would be appealable under 1292 (a) (1) as a request for an injunction. When in those circumstances, it is appropriate and proper that the issue be determined by the state court, then a request that the District Court be stayed must likewise be regarded as a request for an injunction under 1292 (a) (1).

Certainly, if any stay qualifies as an injunction, then a stay involving a matter having one of the highest claims to public interest should qualify. The developing law on contempt cases seems to recognize that it is essential for a Court, other than the Court involved, to pass on serious matters in that area; and appellants believe that the same holds true in this case, that it is essential for the U. S. Court of Appeals to pass on the matter, when the course of action being taken by the District Court does involve the serious matter of federal and state court relations.

This Court in Baltimore Contractors v. Bodinger, supra, reviewed the legislative history on interlocutory appeals as follows, l. c. 252:

> "The provision for interlocutory appeals was first introduced in 1891, when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat. 826, Section 7 of that Act allowed appeals from interlocutory orders in equity 'granting or continuing' injunctions, but for those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of § 1292 in its present form.
>
> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences."

This case involves the serious matter of federal and state court relations. If ever "an ounce of prevention is worth a pound of cure," then it is time for the federal courts to use that ounce of prevention and to stay the proceedings in the District Court, for the problem of straightening out the matter, after the District Court has proceeded to trial, becomes most formidable. It would contribute greatly to the administration of justice if this Court would rule on the applicable procedure to stay—that is, if this Court would state whether it prefers that review of the District Court's refusal to stay be by appeal or by direct application for a stay to the Court of Appeals and then to this Court; so that the procedure would be clear and so that a conflict between the federal and state courts could thereby be resolved at the earliest point in time.

The petitioners' grounds for stating that this case involves the serious matter of federal and state court relations are as follows:

> The suit in District Court seeks to obtain a deficiency judgment against the petitioners based upon a purported sale on December 14, 1970, by a trustee under a deed of trust on petitioners' real estate in Boone County, Missouri. The validity of that sale, at which the respondent, who is the holder of said deed of trust, purportedly bought said real estate, and at which the trustee conducting said sale was a member of the law firm representing respondent then and now, is presently being adjudicated in a proceeding in equity, brought by petitioners against respondent, said cause being No. 52930 of the Circuit Court of Boone County, Missouri.
>
> The District Court in an interlocutory order on June 10, 1971, denied petitioners' Motion to Stay Proceedings in the District Court, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated. The District Court found that respondent does not seek to stay the state court proceeding and the District Court is of the opinion that both the federal and state cases may properly proceed together.
>
> The petitioners contend that the situation of both the federal and state courts proceeding on the subject is not in the interest of justice and it has serious adverse effects on federal and state court relations and on the due process rights of petitioners, as set forth in the Fifth Amendment to the U. S. Constitution.

The petitioners' ground for stating that said order of June 10, 1971, is in violation of the Fifth Amendment to the U. S. Constitution is based on the following:

(1) Respondent's complaint seeks to impose on petitioners a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore, the basis of the federal court action, is the matter being determined by the state court.

(2) The District Court's findings mention that respondent does not seek to stay the state court action and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) The U. S. Supreme Court in England v. Louisiana State Board of Medical Examiners, 84 S.Ct. 461 (1964), has stated that the doctrine of abstention is a recognition of the state court's particular competency in such matters, to wit:

> "Abstention is a judge-fashioned vehicle for according deference to the 'respective' competence of the state and federal court systems.'
>
> "Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

(4) Therefore, to deny abstention under the circumstances is to impose on petitioners a determination of that issue by a tribunal recognized as not the most competent to decide that matter, and, therefore, is a denial to petitioners of the due process of law, guaranteed to them by the Fifth Amendment to the U. S. Constitution.

The U. S. Supreme Court's aforementioned statements in England v. Louisiana State Board of Medical Examiners also lead to the conclusion that further proceedings

by the District Court under the circumstances would be invalid, because of the aforementioned recognition "of the role of state courts as the final expositors of state law," for

(1) Respondent's complaint seeks to impose on petitioners a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore, the basis of the federal court action, is the matter being determined by the state court.

(2) The District Court's findings mention that respondent does not seek to stay the state court action and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) Not only is the state court recognized as the most competent to determine the matter, but it is also recognized as the "final expositor of state law," which means that its determination of the matter will govern. The federal court can take no action inconsistent with the state court's determination; and it can't know the state court's determination, until the state court has finally adjudicated the matter. Therefore, proceedings in the federal court must be stayed pending the final adjudication of the state court case.

The District Court mentioned in its ruling of June 10, 1971, that the federal court case was instituted prior to the state court case. This is true, but petitioners believe that respondent's actions subsequent to the filing of the federal court case are to be adjudged analogously to the U. S. Supreme Court's ruling in England v. Louisiana State Board of Medical Examiners as regards the transfer cases. In the transfer cases, when the federal court has transferred the parties in a federal court case to the state

court for a determination of a local or state issue, the U. S. Supreme Court in the England case held that if the parties, when transferred to the state court, proceed to "argue" their claims under the U. S. Constitution; then the parties shall be deemed to have "abandoned" the federal District Court.

In this case, respondent, after the filing of the federal suit seeking a deficiency judgment based on the purported trustee's sale on December 14, 1970, was unwilling to await the determination by the federal court of the consequences of that purported sale and proceeded to enter into a contract to sell said real property to another person, who resides in Boone County, Missouri. Immediately, upon learning of said contract, petitioners brought suit in equity against respondent and said other party in the Circuit Court of Boone County, Mo., to enjoin any consummation of that purported sale to said other party and to set aside the purported trustee's sale of December 14, 1970, before more purported transfers of said real property were made. Respondent entered into that litigation in said state court action and did not seek to remove it to federal court and; as the District Court has found, does not seek to stay the state court proceeding.

Therefore, respondent by its actions subsequent to its filing of the federal suit, has, analogous to the England case, "abandoned" its claim to having the federal District Court determine the matter of state law or respondent has neutralized its claim to federal jurisdiction based on diversity, and, under the circumstances, the District Court must abstain in the public interest to avoid needless friction with the state courts, and, failing to abstain on that basis, the District Court must abstain on the ground that further proceedings would be in violation of petitioners' due process rights under the Fifth Amendment to the U. S. Constitution, as detailed above.

(d) The petition for writ of certiorari is pursuant to 28 U.S.C. 1254(1), to wit:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:'
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

This petition seeks issuance of a writ of certiorari to review a denial for lack of jurisdiction of petitioner's appeal to the Court of Appeals from an interlocutory order of a District Court of the United States, which appeal was taken pursuant to 28 U.S.C. 1292(a)(1) to wit:

> "(a) The Courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

and particularly that part thereof that relates to refusing injunctions.

The denial of motion to stay proceedings in the District Court not only has serious adverse effects on federal and state court relations, but it is a denial to petitioners of the due process provisions of the Fifth Amendment to the U. S. Constitution, to wit:

> ". . . nor shall any person be deprived of life, liberty or property without due process of law;"

(e) A concise statement of the case containing the facts material to the consideration of the questions presented:

The suit in District Court seeks to obtain a deficiency judgment against the petitioners based upon a purported sale on December 14, 1970, by a trustee under a deed of trust on petitioners' real estate in Boone County, Missouri. The validity of that sale, at which the respondent, who is the holder of said deed of trust, purportedly bought said real estate, and at which the trustee conducting said sale was a member of the law firm representing respondent then and now, is presently being adjudicated in a proceeding in equity, brought by petitioners against respondent, said cause being No. 52930 of the Circuit Court of Boone County, Missouri.

The respondent, after the filing of its federal suit seeking a deficiency judgment based on the purported trustee's sale on December 14, 1970, was unwilling to await the determination by the federal court of the consequences of that purported sale and proceeded to enter into a contract to sell said real estate to another party, who resides in Boone County, Missouri. Immediately, upon learning of said contract, petitioners brought said suit in equity against respondent and said other party in the Circuit Court of Boone County, Missouri, to enjoin any consummation of that purported sale to said other party and to set aside the purported trustee's sale of December 14, 1970, before more purported transfers of said real property were made. Respondent entered into that litigation in said state court action and did not seek to remove it to federal court, and as the District Court has found, respondent does not seek to stay the state court proceeding.

The District Court, in an interlocutory order on June 10, 1971, denied petitioners' Motion to Stay Proceedings in the District Court, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated. The District Court found that respondent does not seek

to stay the state court proceeding and the District Court is of the opinion that both the state and federal cases may properly proceed together.

Petitioners, in a Motion for Rehearing of Motion to Stay Proceedings filed on June 21, 1971, stated to the Court in part that: ". . . the situation of both the federal and state courts proceeding on the subject is not in the interests of justice and it has serious adverse effects on federal-state relations and it is a violation of petitioners' rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

On June 23, 1971, the District Court denied the Motion for Rehearing, saying it contained nothing new, and on June 25, 1971, petitioners filed their Notice of Appeal to the Court of Appeals for the Eighth Circuit from the interlocutory order of June 10, 1971.

Respondent filed a Motion to Dismiss the appeal for lack of jurisdiction with the Court of Appeals. Petitioners filed a Response thereto. The Court of Appeals on July 23, 1971, granted the motion to dismiss. Petitioners have filed this petition for writ of certiorari to review said order of July 23, 1971, of the Court of Appeals.

The District Court's order, denying the stay of all proceedings pending the final adjudication of the state court action, is dated June 10, 1971, and contains leave for petitioners to assert in federal court any defenses or counterclaims presently asserted in the state court. Petitioners, in their Motion for Rehearing of Motion to Stay Proceedings filed on June 21, 1971, stated in part:

> "Said defendants wish to assert herein all the counterclaims and defenses presently asserted by them in . . . state court and believe their assertion is es-

> sential to a just adjudication of this case. Also, the defendants believe the situation of both the federal and state courts proceeding on the subject is not in the interests of justice and it has serious adverse effects on federal-state relations and it is a violation of defendants' rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

and petitioners proceeded to detail the reason for stating that said order was in violation of the Fifth Amendment to the U. S. Constitution.

On June 23, 1971, the District Court denied the motion for rehearing, saying it contained nothing new, and extended the time for amending the pleadings to include the state court defenses and counterclaims to June 30, 1971. On June 25, 1971, petitioners filed their Notice of Appeal to the Court of Appeals from the interlocutory order of June 10, 1971. On June 30, 1971, petitioners filed with the District Court a Motion to Stay While Appeal is Pending, together with amended pleadings incorporating their state court defenses and counterclaims. In that Motion to Stay While Appeal is Pending, petitioners stated that:

> "Defendants have filed their amended pleadings, as above set forth, together with the filing of this motion. Defendants state, however, that to require them to proceed further in this case, prior to the determination of their appeal, would have the effect of prejudging that appeal and of depriving them of said appeal without a hearing of it on the merits by the U. S. Court of Appeals."

Petitioners believe jurisdiction of the case was transferred from the District Court to the U. S. Court of Appeals for the Eighth Circuit upon petitioners' filing of

their Notice of Appeal on June 25, 1971. As Chief Justice Burger said in his State of the Federal Judiciary address to the American Bar Association in New York, New York, on July 5, 1971, and reprinted in vol. 91, No. 18, S. Ct. Reporter, p. 11 of yellow pages: "When that notice is filed the District Court loses jurisdiction . . ." Likewise, Rule 1b of the Rules of Appellate Procedure states that said rules shall not be construed to extend or limit the jurisdiction of the U.S. Courts of Appeals.

In light of the foregoing, and the Congressional intent in regard to appeals from interlocutory orders, as interpreted by the Supreme Court and quoted above, petitioners do not believe that Rule 8 of the Rules of Appellate Procedure is applicable to the appeal from the interlocutory order; however, the petitioners have attempted to conform thereto by asking the District Court to stay proceedings in the District Court while said appeal is pending, preparatory to asking the Court of Appeals to stay proceedings in the District Court while said appeal is pending, should the District Court refuse to do so.

The District Court did not rule on that Motion until after the Court of Appeals dismissed the appeal for lack of jurisdiction and ordered its mandate to issue. Upon receiving the mandate, the District Court ruled that the Motion to Stay While Appeal is Pending was now moot. On July 30, 1971, petitioners filed with the Court of Appeals for the Eighth Circuit a Motion to Recall and Stay Mandate, pending the prompt filing of this petition for writ of certiorari. On August 2, 1971, the Court of Appeals denied petitioners' Motion to Recall and Stay of Mandate.

The respondent, after filing its Motion to Dismiss for lack of jurisdiction in the Court of Appeals, later filed a Motion to Affirm. In their response to the first motion, petitioners mentioned that they would file a separate re-

sponse to the second motion; however, prior to the filing of that response, the Court of Appeals denied the Motion to Affirm, at the same time it was granting the Motion to Dismiss.

(f) Subsection (f) of Supreme Court Rule 23 (1) concerns review of state court judgments, and, therefore, is inapplicable to this requested review of the order of the U.S. Court of Appeals for the Eighth Circuit.

(g) The basis of respondent for federal jurisdiction in the court of first instance is diversity of citizenship, 28 U.S.C. 1332 (a) (1); however, attention is called to the last three paragraphs of (c) above re respondent's actions following the filing of its complaint in federal court.

(h) The defining of the proper roles of the federal and state courts is a continuing process of primary importance to the administration of justice in the United States. It is also essential to the preservation of our federalism. A comprehensive treatment of the subject is contained in the Supreme Court's decision in England v. Louisiana State Board of Medical Examiners, supra. Petitioners believe their position, as regards the respective roles of the federal and state courts, is fully in accord with that decision.

When a serious conflict arises between the federal and state courts, it is of equal importance that the procedure for resolving that conflict be clear.

The petitioners believe that this case involves a serious conflict between the federal and state courts, and, requested the District Court to stay all proceedings in the District Court, until the state court had completed its adjudication on the matter. The District Court refused to stay and the refusal to stay was appealed to the Court of Appeals for the Eighth Circuit.

Since petitioners met the requirements of Standard Chlorine of Delaware, Inc. v. Leonard, supra, to-wit, that they sought to stay a proceeding at law in the District Court, pending the prior determination of a proceeding in equity in the state court, petitioners followed the established procedure set forth in Standard Chlorine by appealing pursuant to Section 1292 (a) (1). This Court, and the Courts of Appeals for the Second, Fifth and Tenth Circuits have interpreted such a request for a stay as being a request for an injunction within the meaning of that section.

Apparently, the Eighth Circuit does not agree with those decisions, for it dismissed petitioners' appeal for lack of jurisdiction, but filed no opinion with the order of dismissal.

In Baltimore Contractors v. Bodinger, supra, the Supreme Court discussed the historical reasons for treating such a stay as an injunction and stated that any changes in such an interpretation should come from Congress. Congress has not sought to change that interpretation.

Any arguments for changing the interpretation due to the fusion of law and equity were dealt with in Baltimore Contractors, as mentioned above, and would be inapplicable anyway in this case, where the equity proceeding is in the state court and the law type proceeding in the federal court, in light of this Court's statements in England v. Louisiana State Board of Medical Examiners on the respective roles of the federal and state courts, as detailed in (c) above.

While the right of appeal seemed clear in such circumstances, it now becomes necessary to reaffirm or clarify it, in view of the Eighth Circuit's decision.

It may be possible for petitioners to seek a stay of proceedings in the District Court by making application to the

Court of Appeals and then to the Supreme Court, pursuant to 28 U.S.C. 1651. This is another reason why petitioners believe it is very important for the Supreme Court to rule on the applicable procedure. This situation of trying to determine whether the procedure for review of the District Court's refusal to stay should be pursuant to No. 1292 (a) (1) or No. 1651 seems similar to the situation prevailing on what is the proper procedure for review of the District Court's refusal to issue a writ of habeas corpus, whether the refusal of the writ should be appealed to the Court of Appeals and then to the Supreme Court or whether the writ should be sought from the Court of Appeals, and, if it refuses, then from the Supreme Court. The Supreme Court, to petitioners' knowledge, has stated that it regards the appeal procedure as being preferable to seeking the writ directly from the Court of Appeals and the Supreme Court. Petitioners believe the same would be true in this case, that the appeal procedure would be preferable, and petitioners believe it would contribute greatly to the administration of justice, if the Supreme Court would make known what it regards as the preferable procedure under the circumstances.

WHEREFORE, petitioners pray the Supreme Court to issue a writ of certiorari to the Court of Appeals for the Eighth Circuit to review its order of July 23, 1971, in cause No. 71-1366, dismissing petitioners' appeal for lack of jurisdiction.

J. WARD DRISCOLL
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863-3387
Attorney for Petitioners

In the United States District Court for the
Eastern District of Missouri
Eastern Division

The Northern Trust Company, as Trustee, Plaintiff, vs. Robert I. Clausen, H. B. Surkamp, R. G. Surkamp, Hadley P. Stonner and Rolland J. Walters, Defendants.	Cause No. 71C 76(3).

COMPLAINT

(Filed Feb. 5, 1971)

Comes now The Northern Trust Company, as Trustee and for its cause of action against defendants, states that:

1. Plaintiff is The Northern Trust Company, as Successor Trustee under Agreement dated as of October 1, 1932 as amended with Teletype Corporation for the Teletype Corporation Pension Fund. The Northern Trust Company is a corporation duly organized and existing under the laws of the State of Illinois, with its principal place of business in the State of Illinois.

2. Defendants are residents of the State of Missouri.

3. This Court has jurisdiction of this Cause under the provisions of Title 28, Section 1332(a)(1), U.S.C.A.

4. On April 28, 1969, defendants executed and delivered their promissory note payable to the order of The Chase Manhattan Bank (National Association) as Trustee. A copy of said note is marked Exhibit A, attached hereto and incorporated herein by reference.

5. On April 28, 1969, defendants made and entered into a deed of trust covering property situated in Columbia,

Missouri, to secure said note. A copy of said deed of trust is marked Exhibit B, attached hereto and incorporated herein by reference.

6. On January 1, 1970, said note was assigned, transferred and delivered to plaintiff. From and after said date, plaintiff was and now is the owner and holder of said note.

7. Defendants failed and refused to pay said note according to its terms, and otherwise breached and violated the terms and covenants of said deed of trust, and on November 10, 1970, plaintiff declared all unpaid indebtedness evidenced by said note immediately due and payable.

8. On December 14, 1970, the property covered by said deed of trust was sold at public sale, pursuant to the terms thereof.

9. After giving defendants all credits to which they are entitled, including the net proceeds received by plaintiff from the sale of said property, there remains due and owing to plaintiff under said note and deed of trust the principal sum of $73,452.40.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, in the sum of $73,452.40, together with interest thereon from and after December 14, 1970, at the rate of 8% per annum, for its costs in collecting the same including reasonable attorney's fees as provided by said note, and for such other and further relief as to the Court may seem just and proper.

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231-5833
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In the United States District Court
For the Eastern District of Missouri
Eastern Division

(Caption Omitted.)

MOTION TO STAY PROCEEDINGS

Come now the defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and move the Court to stay all proceedings in this cause, to wit: No. 71 C 76 (3) of the United States District Court for the Eastern District of Missouri, Eastern Division, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated.

A copy of Plaintiffs' Second Amended Petition in said cause, No. 52930 of the Circuit Court of Boone County, Missouri, wherein Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner are plaintiffs and the following are defendants, namely: The Northern Trust Company, a corporation, as trustee u/a with Teletype Corporation, John M. Drescher, Jr., Gene Schultz, Robert G. Surkamp and Rolland J. Walters, is attached hereto as Exhibit 1 of the Defendants Clausen, H. B. Surkamp and Stonner.

Cause No. 71 C 76 (3) in this District Court of the United States was brought by the Northern Trust Co. and seeks to assess a deficiency judgment against the named defendants based upon a purported sale on December 14, 1970, under a deed of trust on certain real property in Boone County, Missouri, which real property is owned by Williamsburg Developments, a partnership comprised of Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner; however, the validity of that purported sale, at which the Northern Trust Co. purportedly bought said real property, is presently being adjudicated in said cause No. 52930 of the Circuit Court of Boone County, Missouri, and it is appropriate and proper that the validity of said purported sale be adjudicated in said

cause in the Circuit Court of Boone County, Missouri, since said cause involves title to real estate in Boone County, Missouri, and involves the foreclosure laws of the State of Missouri, and the issues before said court of the State of Missouri do not involve the Constitution, treaties or laws of the United States. Further, following said purported sale on December 14, 1970, the Northern Trust Co. attempted to sell said property to Gene Schultz of Boone County, Missouri, and, therefore, recourse to said state court was immediately necessary to adjudicate title to said real estate, before more purported transfers of said real estate were made.

Wherefore, the defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, pray for the relief mentioned above, to wit: that all proceedings in this cause No. 71 C 76 (3) be stayed, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated.

s/ JAMES C. BUTCHER
9 North Eighth Street
Columbia, Missouri 65201
449-4126
Attorney for Defendant, Robert I. Clausen

s/ J. WARD DRISCOLL
25 South Bemiston
Clayton, Missouri 63105
863-3387
Attorney for Defendant, Harry B. Surkamp

s/ CLARENCE W. HAWK
601 North High Street
California, Missouri 65018
796-2114
Attorney for Defendant, Hadley P. Stonner

In the Circuit Court of Boone County, Missouri

Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner, Plaintiffs, vs. The Northern Trust Company, a corporation, as trustee u/a with Teletype Corporation, John M. Drescher, Jr., Gene Schultz, Robert G. Surkamp and Rolland J. Walters, Defendants.	Case No. 52930

PLAINTIFF'S SECOND AMENDED PETITION

Come now the plaintiffs and for their cause of action state to the Court that:

1. The plaintiffs are all the partners in Williamsburg Developments, a partnership.

2. The defendant Gene Schultz is a resident of Boone County, Mo.; the defendant John M. Drescher, Jr., is a resident of St. Louis County, Mo.; the defendant Rolland J. Walters is a resident of Boone County, Mo.; the defendant Robert G. Surkamp is a resident of St. Louis County, Mo.; the defendant Northern Trust Company is an Illinois corporation engaged in the trust business and is the holder of the hereafter referred to deed of trust on plaintiffs' real estate as an investment under a trust agreement dated as of October 1, 1982, and later amended, by and between Northern Trust Company, as trustee, and the Teletype Corporation for the Teletype Corporation Pension Fund.

3. The causes alleged in this petition involve a certain piece of real estate, at all times mentioned herein owned

by Williamsburg Developments, a partnership, and said real estate is located in Boone County, Mo., and is more particularly described as follows:

> A tract of land in the NE 1/4 of Section 19, Township 48, Range 12 in Columbia, Missouri, and more particularly described as follows: Beginning at the Northeast corner of Tract No. 3 of Boone County Survey No. 7296; thence S 33 degrees 17 minutes W 610 feet, thence N 56 degrees 43 minutes W 120 feet; thence S 33 degrees 17 minutes W 50 feet; thence N 56 degrees 43 minutes W 70 feet; thence N 33 degrees 17 minutes E 50 feet; thence N 56 degrees 43 minutes W 210.9 feet; thence N 52 degrees 55 minutes E 474.9 feet; thence N 89 degrees 18 minutes E 291 feet to the point of beginning and containing 3.83 acres.

4. On or about April 28, 1969, the plaintiffs, Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner, and the defendants Robert G. Surkamp and Rolland J. Walters, said defendants being at that time, but not now, partners with plaintiffs in Williamsburg Developments, a partnership, executed a certain deed of trust as parties of the first part therein and mortgagors in behalf of Williamsburg Developments, a partnership, on the above described real estate, and said deed of trust, which is recorded in Book 394 Page 288 of the Boone County Recorder's office, was executed as security for a certain note dated April 28, 1969, for money borrowed, the principal and interest of said note being payable in amortized monthly installments over a period of 30 years, beginning May 1, 1969, and continuing until November 1, 1991.

5. On December 14, 1970, the defendant John M. Drescher, Jr., named as party of the second part and trustee in aforesaid deed of trust held a purported trustee's sale of the real estate described in the deed of trust, and at said sale on December 14, 1970, purported to sell said real estate to the defendant Northern Trust Co., as

trustee under agreement with Teletype Corporation, and then on January 5, 1971, the defendant John M. Drescher, Jr., executed a trustee's deed purportedly conveying said real estate to the defendant Northern Trust Co., as trustee under agreement with Teletype Corporation.

6. Said purported sale is void and invalid due to the following grounds, each of which ground is sufficient in and of itself to render said purported sale void and invalid:

(1) The trustee failed to sell the property to the highest bidder for cash at said sale, which was Land III, Ltd., a Missouri corporation, and failed to allow Land III, Ltd., a reasonable time to pay the amount of its bid.

(2) The trustee did not conduct said sale impartially in that at all times, that he was purporting to act as trustee, he was in fact a member of the law firm, Lewis, Rice, Tucker, Allen & Chubb, which was at all times mentioned herein acting as the attorney for the defendant Northern Trust Co., the holder of said deed of trust, and said trustee refused to sell to the highest bidder for cash at said sale and instead purported to sell said property to his law firm's client, Northern Trust Co., and that in so doing and in the conduct of said sale trustee was not impartial and could not have been impartial under the circumstances in that at the same time he was acting as trustee and required to perform said office in a manner equivalent to a chancellor in equity, he proceeded to make rulings involving the two bidders at said sale, namely, Land III, Ltd. and Northern Trust Co., and made said rulings in favor of his law firm's client and against Land III, Ltd.

(3) The trustee did not attempt to obtain the best price for said property and did not attempt to hold said sale in such a manner that would be in the best

interests of both mortgagors and mortgagee, but instead held said sale in such a manner as was in the best interest of only the mortgagee and was not in the best interest of the mortgagors.

(4) The deed of trust purports to be security for a note in the principal amount of $525,000; whereas both the defendant trustee and the defendant Northern Trust Co. knew said amount was false and knew that not more than $475,000 had been loaned on said note to mortgagors, but said defendants took no action to reform said deed of trust and instead said defendants purported to foreclose said deed of trust well knowing that the principal amount of the note as shown on said deed of trust was false, and that said course of conduct was misleading to the public.

7. The purported trustee's deed dated January 5, 1971, is likewise void and invalid, as it is based on the void and invalid trustee's sale on December 14, 1970.

8. The plaintiffs have reason to believe that the defendant Northern Trust Co. has attempted to sell said above described real estate to the defendant Gene Schultz, and the defendant Northern Trust Co. does not own said real estate and should be prohibited and enjoined from consummating or attempting to consummate any purported sale of said property to Gene Schultz or to any one else.

9. Not only was said trustee's sale on December 14, 1970, void and invalid on the aforesaid grounds, but defendants John M. Drescher, Jr. and Northern Trust Co. were not entitled to institute foreclosure proceedings in the first place, for prior to the institution of any such proceedings plaintiffs offered on several occasions to pay to Northern Trust Co. all past due installments on said loan, but defendant Northern Trust Co. wrongfully refused to accept said payments.

10. The plaintiffs have invested over $280,000 in said real estate over and above the amount borrowed on aforesaid deed of trust and over and above the amounts already repaid by plaintiffs on said deed of trust, and plaintiffs are ready, willing and able to pay any past due installments on said deed of trust.

11. The plaintiffs constructed on said real estate six separate apartment buildings, containing a total of 34 apartment units.

12. On or about December 1, 1970, and prior to the aforesaid void and invalid trustee's sale on December 14, 1970, the defendant Northern Trust Co. unlawfully seized possession of aforesaid real estate and apartment buildings and of the books and records of plaintiffs at said location, and since said time the defendant Northern Trust Co. has unlawfully collected the rentals from said property and has unlawfully withheld possession of said real estate and apartment buildings and of said books, records and rentals. Plaintiffs are entitled to restoration of the possession of said real estate and apartment buildings and of said books and records, and are entitled to an accounting from Northern Trust Co. of the rentals collected by Northern Trust Co., and are entitled to a credit for said rentals against any past due installments on said deed of trust.

13. Plaintiffs do not have an adequate remedy at law.

14. The defendants Rolland J. Walters and Robert G. Surkamp may have an interest in this proceeding and may be affected by the result, since they signed the note, secured by said deed of trust, and therefore they have been made defendants in this proceeding.

WHEREFORE, plaintiffs pray that the Court adjudge the aforesaid trustee's sale on December 14, 1970, and the

aforesaid trustee's deed dated January 5, 1971, to be void and invalid, and that the Court order defendant Northern Trust Co. to furnish to plaintiffs an accounting of all rentals collected from said property by Northern Trust Co. and to restore possession of said real estate and apartment buildings and the books and records of palintiffs to plaintiffs, and plaintiffs further pray for such other and further relief as to the Court shall seem fit and proper under the circumstances and for their costs in this behalf expended.

s/ JAMES C. BUTCHER
9 North Eighth Street, Columbia, Mo. 65201
449-4126
Attorney for Plaintiff Robert I. Clausen

s/ J. WARD DRISCOLL
25 S. Bemiston, Clayton, Mo. 63105
863-3387
Attorney for Plaintiff Harry B. Surkamp

s/ CLARENCE W. HAWK
601 North High Street, California, Mo. 65018
796-2114
Attorney for Plaintiff Hadley P. Stonner

In the United States District Court
For the Eastern District of Missouri
Eastern Division

The Northern Trust Company, as Trustee, Plaintiff, vs. Robert I. Clausen, H. B. Surkamp, R. G. Surkamp, Hadley P. Stonner and Rolland J. Walters, Defendants.	Cause No. 71 C 76 (3).

STATEMENT IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND REQUEST FOR ORAL ARGUMENT

The following brief statement is made by defendants, Clausen, H. B. Surkamp and Stonner, pursuant to local rule VII c (2) of said Court:

The policy of the federal courts in allowing state courts to adjudicate matters of state or local law, such as, in this instance, whether the purported trustee's sale on December 14, 1970, was in conformity with the foreclosure laws of the State of Missouri, is expressed in England v. La. State Board of Medical Examiners, 84 S.Ct. 461 (1964), as follows:

> "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.'
>
> "Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

Further, pursuant to local rule VII c (1) of said Court, said defendants request that there be oral argument on said Motion To Stay Proceedings.

s/ JAMES C. BUTCHER
Attorney for Defendant Clausen

s/ J. WARD DRISCOLL
Attorney for Defendant H. B. Surkamp

s/ CLARENCE W. HAWK
Attorney for Defendant Stonner

In the United States District Court
For the Eastern District of Missouri
Eastern Division

(Caption Omitted)

PLAINTIFF'S STATEMENT IN OPPOSITION TO MOTION TO STAY PROCEEDINGS

Comes now plaintiff, The Northern Trust Company as Trustee, and in opposition to defendants' Motion to Stay Proceedings states to the Court as follows:

1. This is not a proper case for the application of the principle of abstention.

Moore, Federal Practice, Vol. 1, pages 2109-10 and pages 2119-20;

Miller v. Miller, 423 Fed. 2d 145 (10th Cir. 1970);

Aetna Life Insurance Company of Hartford, Connecticut v. Martin, 108 Fed. 2d 824 (8th Cir. 1950).

2. This suit was filed in this Court and this Court acquired jurisdiction over this cause prior to the suit referred to in defendants' Motion to Stay.

3. This Court has jurisdiction over this cause and plaintiff should be entitled to proceed to judgment herein.

Respectfully submitted

LEWIS, RICE, TUCKER, ALLEN & CHUBB
By R. RICHARD STRAUB
1555 Railway Exchange Building
611 Olive Street
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231-5833
Attorneys for Plaintiff.

United States District Court
Eastern District of Missouri
Eastern Division

(Caption Omitted)

ORDER

(Filed June 10, 1971)

This matter is before the court on motion of defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner to stay all proceedings in this case pending adjudication of Cause No. 52930 in the Circuit Court of Boone County, Missouri.

Plaintiff filed its complaint in this district February 5, 1971 in which it seeks to recover as assignee and holder of a certain promissory note alleged to have been executed by defendants and secured by a certain deed of trust covering property situated in Columbia, Missouri. Subsequently, Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner filed a petition in the Circuit Court of Boone

County seeking to invalidate a purported trustee's sale on behalf of The Northern Trust Company which took place on December 14, 1970 and in which The Northern Trust Company purchased in the property. Movants now contend that this court should invoke the rule of abstention until the validity of the foreclosure sale has been determined in the state court.

At the hearing on the motion, counsel for plaintiff represented that the Second Amended Petition was filed in the state court after the Circuit Court had sustained its Motion to Dismiss the first Amended Petition. A hearing on the Motion to Dismiss the Second Amended Petition is pending in the Circuit Court and scheduled for hearing June 15, 1971.

The suit in this court is on a promissory note. The suit in the state court, filed subsequent to this suit, does not include all of the parties in this action. In response to a question by the court at the hearing, defense counsel stated that there were no novel questions of Missouri law to be adjudicated in the state court proceeding and that there were no issues in that case which could not be adjudicated in a federal court under pendant jurisdiction.

Moore, Federal Practice, Vol. 1A, pages 2109-10 sets forth the principal guidelines for abstention, namely: "Thus a federal action will not be held in abeyance and the parties remitted to a state forum for the adjudication of the local issues where no state court ruling on local law could settle the federal questions that would necessarily remain, where the state law is fairly certain, * * * and even where the federal issues are of a non-constitutional nature and Congress has plainly provided for federal jurisdiction federal courts will determine the entire controversy including an underlying local question based upon state law."

Based upon the pleadings and the representations of counsel at the hearing, the court is of the opinion that this is not a proper case for abstention and that all of the issues both state and federal can be determined in this court should the defendants seek to incorporate their state court claims and defenses in this action. Plaintiff does not seek to enjoin the state proceeding, and both state and federal cases may properly proceed together. **Miller v. Miller,** 423 F.2d 145 (10th Cir. 1970); **Aetna Life Insurance Company of Hartford, Connecticut v. Martin,** 108 F.2d 824 (8th Cir. 1940).

Accordingly, it is ORDERED that defendants' motion to stay proceedings be and hereby is denied. Defendants are granted leave to amend their responsive pleading within ten days so as to assert any counterclaims or defenses presently asserted in the state court action which they may wish to assert in this case.

Dated: June 10, 1971

/S/ WILLIAM H. WEBSTER
United States District Judge

In the United States District Court for the Eastern District of Missouri, Eastern Division

(Caption Omitted)

MOTION FOR REHEARING OF MOTION TO STAY PROCEEDINGS

Come now the defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and for their Motion for Rehearing of their Motion to Stay Proceedings, state to the Court that:

1. On June 10, 1971, the Court denied said defendants' motion to stay proceedings in this cause, pending adjudication of a state court action, and granted defendants leave to amend their responsive pleadings within ten days, so as to assert any counterclaims or defenses presently asserted in the state court action, which they may wish to assert in this case.

2. Said defendants wish to assert herein all the counterclaims and defenses presently asserted by them in Plaintiffs' Second Amended Petition in state court and believe their assertion is essential to a just adjudication of this case. Also, the defendants believe that the situation of both the federal and state courts proceeding on the subject is not in the interests of justice and it has serious adverse effects on federal-state relations and is a violation of defendants' rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution.

3. The ground for stating that said order is in violation of the Fifth Amendment to the U. S. Constitution is based on the following:

(1) Plaintiff's petition seeks to impose on defendants a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore the basis of the federal court action, is the matter being determined by the state court.

(2) The Court's findings mention that Plaintiff does not seek to stay the state court action and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) The U. S. Supreme Court in England v. La. State Board of Medical Examiners, 84 S.Ct. 461 (1964), has

stated that the doctrine of abstention is a recognition of the state court's particular competency in such matters, to wit:

> "Abstention is a judge-fashioned vehicle for according deference to the 'respective competence of the state and federal court systems.'
>
> "Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

(4) Therefore, to deny abstention under the circumstances is to impose on defendants a determination of that issue by a tribunal recognized as not the most competent to decide that matter, and, therefore, is a denial to defendants of the due process of law, guaranteed to them by the Fifth Amendment to the U. S. Constitution.

4. Said defendants have previously filed a Motion to File Exhibits Pursuant to local rule VII (4). Said motion was filed subsequent to the Court's order of June 10, 1971, but prior to defendants receiving actual notice of said order. Defendants ask that said Exhibits, attached to said motion, and the material in said motion, be considered as an aid to the Court in its determination of this Motion for Rehearing.

5. Further, defendants ask that they be allowed appropriate additional time for amending their pleadings, as set forth in 2. above, should this Court deny or overrule this Motion for Rehearing.

WHEREFORE, defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner pray the Court for rehearing of their Motion to Stay Proceedings in light of this Court's findings and their relation to the due process pro-

visions of the Fifth Amendment to the U. S. Constitution, and for the relief mentioned in 4. and 5. above.

s/ J. WARD DRISCOLL
Attorney for Defendant
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863-3387

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CLARENCE W. HAWK
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Attorneys for Defendant
Hadley P. Stonner
601 North High Street
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796-2114

United States District Court
Eastern District of Missouri
Eastern Division

(Caption Omitted)

ORDER

(Filed June 23, 1971)

This matter is before the court on Motion of defendants Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner

for Rehearing on their Motion to Stay Proceedings. On June 10, 1971, this court entered its Order denying the motion of said defendants to stay proceedings pending adjudication of a certain state action in the Circuit Court of Boone County, Missouri. Movants instituted the state action after plaintiff had filed its complaint in this court. The claims asserted in the state action could have been asserted as a counterclaim or defense in the instant case.

No grounds were asserted in support of the Motion for Rehearing of Motion to Stay Proceedings which were not considered by the court in entering its Order of June 10, 1971, nor was any brief filed in support of the motion in accordance with our rules.

The court being fully advised, it is ORDERED that said defendants' Motion for Rehearing of Motion to Stay Proceedings be and is hereby denied. The time previously granted for defendants to amend their responsive pleading so as to assert any counterclaims or defenses presently asserted in the state court action which they may wish to assert in this case is extended to June 30, 1971.

Dated: June 23, 1971.

WILLIAM H. WEBSTER
United States District Judge

In the United States District Court for the Eastern District of Missouri, Eastern Division

(Caption Omitted)

MEMORANDUM

The undersigned on behalf of the defendants, Robert G. Surkamp and Rolland J. Walters, states that these defendants do not oppose the motion of the defendants,

Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner which seeks to stay these proceedings.

s/ RICHARD C. THOMAS
BEAR, HINES and THOMAS
300 Guitar Building
Columbia, Missouri 65201
Attorney for Defendants, Robert G. Surkamp and Rolland J. Walters

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In the Circuit Court of Boone County, Missouri

Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner,
Plaintiffs,
vs.
The Northern Trust Company, a Corporation, as Trustee u/a With Teletype Corporation, John M. Drescher, Jr., Robert G. Surkamp and Rolland J. Walters,
Defendants.
Case No. 52930.

PLAINTIFFS' THIRD AMENDED PETITION

Come now the plaintiffs and, for their cause of action, state to the Court that:

1. The plaintiffs are all the partners in Williamsburg Developments, a partnership.

2. The hereinafter mentioned Gene Schultz is a resident of Boone County, Mo.; the defendant John M. Drescher, Jr., is a resident of St. Louis County, Mo.; the defendant Rolland J. Walters is a resident of Boone County, Mo.;

the defendant Robert G. Surkamp is a resident of St. Louis County, Mo.; the defendant Northern Trust Company is an Illinois corporation engaged in the trust business and is the holder of the hereafter referred to deed of trust on plaintiffs' real estate as an investment under a trust agreement dated as of October 1, 1932, and later amended, by and between Northern Trust Company, as trustee, and the Teletype Corporation for the Teletype Corporation Pension Fund.

3. The causes alleged in this petition involve a certain piece of real estate, at all times mentioned herein owned by Williamsburg Developments, a partnership, and said real estate is located in Boone County, Mo.; and is more particularly described as follows:

> A tract of land in the NE ¼ of Section 19, Township 48, Range 12 in Columbia, Missouri, and more particularly described as follows: Beginning at the Northeast corner of Tract No. 3 of Boone County Survey No. 7296; thence S 33 degrees 17 minutes W 610 feet, thence N 56 degrees 43 minutes W 120 feet; thence S 33 degrees 17 minutes W 50 feet; thence N 56 degrees 43 minutes W 70 feet; thence N 33 degrees 17 minutes E 50 feet; thence N 56 degrees 43 minutes W 210.9 feet; thence N 52 degrees 55 minutes E 474.9 feet; thence N 89 degrees 18 minutes E 291 feet to the point of beginning and containing 3.83 acres.

4. On or about April 28, 1969, the plaintiffs, Harry B. Surkamp, Robert I. Clausen and Hadley P. Stonner, and the defendants Robert G. Surkamp and Rolland J. Walters, said defendants being at that time, but not now, partners with plaintiffs in Williamsburg Developments, a partnership, executed a certain deed of trust as parties of the first part therein and mortgagors in behalf of Williamsburg Developments, a partnership, on the above described real estate, and said deed of trust, which is

recorded in Book 394, Page 288 of the Boone County Recorder's office, was executed as security for a certain note dated April 28, 1969, for money borrowed, the principal and interest of said note being payable in amortized monthly installments over a period of 22½ years, beginning May 1, 1969, and continuing until November 1, 1991.

5. On December 14, 1970, the defendant John M. Drescher, Jr., named as party of the second part and trustee in aforesaid deed of trust held a purported trustee's sale of the real estate described in the deed of trust, and at said sale on December 14, 1970, purported to sell said real estate to the defendant Northern Trust Co., as trustee under agreement with Teletype Corporation, and then on January 5, 1971, the defendant John M. Drescher, Jr., executed a trustee's deed purportedly conveying said real estate to the defendant Northern Trust Co., as trustee under agreement with Teletype Corporation.

6. Said purported sale is void and invalid due to the following grounds, each of which ground is sufficient in and of itself to render said purported sale void and invalid:

(1) The trustee failed to sell the property to the highest bidder for cash at said sale, which was Land III, Ltd., a Missouri Corporation, and failed to allow Land III, Ltd., a reasonable time to pay the amount of its bid, which was $440,000.

(2) The trustee did not conduct said sale impartially in that at all times, that he was purporting to act as trustee, he was in fact a member of the law firm, Lewis, Rice, Tucker, Allen & Chubb, which was at all times mentioned herein acting as the attorney for the defendant Northern Trust Co., the holder of said deed of trust, and said trustee refused to sell to the

highest bidder for cash at said sale, namely, Land III, Ltd., at $440,000, and instead purported to sell said property to his law firm's client, Northern Trust Co., who began by bidding $250,000 and gradually increased its bid to $436,000, and that in so doing and in the conduct of said sale trustee was not impartial and could not have been impartial under the circumstances in that at the same time he was acting as trustee and required to perform said office in a manner equivalent to a chancellor in equity, he proceeded to make rulings involving the two bidders at said sale, namely, Land III, Ltd., and Northern Trust Co., and made said rulings in favor of his law firm's client and against Land III, Ltd.

(3) The trustee did not attempt to obtain the best price for said property and did not attempt to hold said sale in such a manner that would be in the best interests of both mortgagors and mortgagee, but instead held said sale in such a manner as was in the best interest of only the mortgagee and was not in the best interest of the mortgagors.

(4) The deed of trust purports to be security for a note in the principal amount of $525,000; whereas both the defendant trustee and the defendant Northern Trust Co. knew said amount was false and knew that not more than $475,000 had been loaned on said note to mortgagors, but said defendants took no action to reform said deed of trust and instead said defendants purported to foreclose said deed of trust well knowing that the principal amount of the note as shown on said deed of trust was false, and that said course of conduct was misleading to the public.

7. The purported trustee's deed dated January 5, 1971, is likewise void and invalid, as it is based on the void and invalid trustee's sale on December 14, 1970.

8. The plaintiffs discovered that subsequent to the purported trustee's sale on December 14, 1970, the defendant Northern Trust Co. entered into a contract to sell said real property to Gene Schultz of Columbia, Mo., and the defendant Northern Trust Co. has acknowledged that it entered into such a contract, but now states that the contract no longer exists. Upon learning of said contract, plaintiffs immediately instituted this action and made Gene Schultz a defendant herein; and Gene Schultz subsequently asked to be dismissed, alleging that he has no contract with the defendant Northern Trust Co., and, therefore, plaintiffs consented to him being dismissed. Plaintiffs state, however, that the purported trustee's sale of December 14, 1970, conferred no ownership rights on said defendant, and said defendant should not engage in trying to sell said property, as said property is owned by plaintiffs and not by defendant.

9. Not only was said trustee's sale on December 14, 1970, void and invalid on the aforesaid grounds, but defendants John M. Drescher, Jr., and Northern Trust Co. were not entitled to institute foreclosure proceedings in the first place, for prior to the institution of any such proceedings plaintiffs offered on several occasions to pay to Northern Trust Co. all past due installments on said loan, but defendant Northern Trust Co. wrongfully refused to accept said payments.

10. The plaintiffs constructed on said real estate six separate apartment buildings, containing a total of 34 apartment units. Said construction commenced in the Spring of 1968 and was completed in the Spring of 1969, at a total cost, for land and buildings, of over $775,000. The value of the property at this time is $1,000,000. All projections for said apartments included the information that construction of a large Veterans Administration Hospital had been started at a distance of approximately one

mile from said apartments, and said hospital was scheduled for completion at approximately the same time the apartments were scheduled for completion, and it was projected by all interested therein that a substantial percentage of the large professional staff that would be employed by the hospital upon completion would be in the market for apartments and that plaintiffs' apartments would probably be best suited to fill that need. Due to delays, the Veterans Administration Hospital, instead of being completed in 1969, is just now nearing completion, and this has affected the rental market for the last year and a half. The plaintiffs have invested over $280,000 in said real estate over and above the amount borrowed on aforesaid deed of trust and over and above the amounts already repaid by plaintiffs on said deed of trust.

11. Plaintiffs are ready, willing and able to pay any past due installments on said deed of trust and hereby offer to pay any past due installments. Plaintiffs believe that said offer is an offer to do equity under the circumstances, and plaintiffs base that belief on the following statements in Missouri cases on the subject, to wit:

> Fitzpatrick v. Federer, 315 S.W.2d 829—". . . offer to redeem means in effect they must offer to do equity in the circumstances, and that usually means putting the parties in the status quo."
>
> Pueblo Real Est. Loan & Inv. Co. v. Johnson, 119 S.W. 2d 274—"Relief varies according to the circumstances. He, who seeks equity, must do equity."

and plaintiffs interpret those statements to mean that restoring the status quo means reinstating the deed of trust and having the plaintiffs make current any past due installments.

11a. (11a. is an alternate paragraph to 11. above) Plaintiffs recognize that the Court's interpretation of redeeming

or doing equity under the circumstances may differ from plaintiffs' interpretation in 11. above. Plaintiffs believe this case to be one of "equitable redemption" rather than "statutory redemption" and that therefore the cases in equity, rather than the statutes, would govern as to what constitutes an offer to redeem; however, plaintiffs also recognize that Courts at times are guided in their rulings in equity by comparable statutes on the subject. Plaintiffs interpret the statutory procedure for redemption (443.420 of Revised Statutes of Mo.) to be in essence the following: 1.) bond for one year's interest, plus past due interest, costs of sale, taxes; 2) full principal balance and accrued interest to be paid within one year or bond to be forfeited. Plaintiffs are ready, willing and able to post such a bond and hereby offer to do so. Plaintiffs also call attention to the situation prevailing in this case, to wit: the defendant Northern Trust Co., not the plaintiffs, is in control of the premises and collecting the rents, due to what plaintiffs regard as an illegal seizure, as set forth in par. 12 below. The rentals that defendant is collecting far exceed the interest that would accrue in one year, etc., and, therefore, the Court might consider allowing defendant to collect said rentals, in lieu of plaintiffs posting a bond for interest and in lieu of plaintiffs being restored to possession for the period of the year.

11b. (11b. is an alternate paragraph to 11. and 11a. above) The plaintiffs seek in good faith to redeem or do equity in the circumstances, as the Court might require under the circumstances. In the event that the Court's requirement would be other than stated in 11. or 11a. above, and should the Court requirement be that redemption or doing equity means offering to pay the full amount of principal and interest at this time, then plaintiffs state that they believe they could refinance said deed of trust within a reasonable period of time. Plaintiffs are endeavoring to refinance said deed of trust at the present

time; however, the circumstances of defendant having possession of the property and the uncertainties created by the purported trustee's sale on December 14, 1970, are not conducive to obtaining said refinancing. A Court order, granting plaintiffs a reasonable period of time to accomplish said refinancing, would do much to alleviate the difficulties of obtaining refinancing.

11c. (11c. is an alternate paragraph to 11, 11a. and 11b.) In the event that the Court's requirements or interpretation of redeeming or doing equity under the circumstances is other than as mentioned in 11., 11a., or 11b., then plaintiffs ask that the Court condition its setting aside of the purported trustee's sale on plaintiffs complying with said requirement or interpretation, and plaintiffs will in good faith attempt to comply.

12. On or about December 1, 1970, and prior to the aforesaid void and invalid trustee's sale on December 14, 1970, the defendant Northern Trust Co. unlawfully seized possession of aforesaid real estate and apartment buildings and of the books and records of plaintiffs at said location, and since said time the defendant Northern Trust Co. has unlawfully collected the rentals from said property and has unlawfully withheld possession of said real estate and apartment buildings and of said books, records and rentals. Plaintiffs are entitled to restoration of the possession of said real estate and apartment buildings and of said books and records, and are entitled to an accounting from Northern Trust Co., of the rentals collected by Northern Trust Co., and are entitled to a credit for said rentals against any past due installments on said deed of trust.

13. The subject matter of this cause of action directly involves title to real estate, which by its nature is unique, and plaintiffs do not have an adequate remedy at law.

14. The defendants Rolland J. Walters and Robert G. Surkamp may have an interest in this proceeding and may

be affected by the result, since they signed the note, secured by said deed of trust, and therefore they have been made defendants in this proceeding.

WHEREFORE, plaintiffs pray that the Court adjudge the aforesaid trustee's sale on December 14, 1970, and the aforesaid trustee's deed dated January 5, 1971, to be void and invalid, and that the Court order defendant Northern Trust Co. to furnish to plaintiffs an accounting of all rentals collected from said property by Northern Trust Co. and to restore possession of said real estate and apartment buildings and the books and records of plaintiffs to plaintiffs, and plaintiffs further pray for such other and further relief as to the Court shall seem fit and proper under the circumstances and for their costs in this behalf expended.

/s/ J. WARD DRISCOLL
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863-3387
Attorney for Plaintiff
Harry B. Surkamp

/s/ JAMES C. BUTCHER
9 North Eighth Street
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449-4126
Attorney for Plaintiff
Robert I. Clausen

/s/ CLARENCE W. HAWK
601 North High Street
California, Missouri 65018
796-2114
Attorney for Plaintiff
Hadley P. Stonner

In the Circuit Court of Boone County, Missouri

Case No. 52,930

(Caption Omitted)

MOTION TO DISMISS

Come now defendants, The Northern Trust Company and John M. Drescher, Jr., as Trustee, and move this Court that it make and enter its Order dismissing Plaintiffs' Third Amended Petition and states as a reason therefor that said Third Amended Petition fails to state a claim upon which relief can be granted.

LEWIS, RICE, TUCKER, ALLEN & CHUBB
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611 Olive Street
St. Louis, Missouri 63101
314/231-5833
By R. RICHARD STRAUB

SAPP, WOODS, DANNOV and ORR
411 Guitar Building
Columbia, Missouri 65201
314/442-3195
By SCOTT ORR

In the United States District Court for the
Eastern District of Missouri, Eastern Division

The Northern Trust Company, as Trustee, Plaintiff, vs. Robert I. Clausen, H. B. Surkamp, R. G. Surkamp, Hadley P. Stonner and Rolland J. Walters, Defendants.	Cause No. 71 C 76 (3).

NOTICE OF APPEAL

Notice is hereby given that defendants Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner hereby appeal to the United States Court of Appeals for the Eighth Circuit from the interlocutory order refusing to stay proceedings entered in this action on the 10th day of June, 1971.

J. WARD DRISCOLL
25 South Bemiston
Clayton, Missouri 63105
863-3387
Attorney for Defendants Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner in re appeal to the U. S. Court of Appeals, Eighth Circuit

In the United States District Court
For the Eastern District of Missouri
Eastern Division

(Caption Omitted)

MOTION TO STAY WHILE APPEAL IS PENDING

Come now the defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and, for their Motion to Stay While Appeal is Pending, state to the Court that:

1. On June 10, 1971, the Court denied said defendants' motion to stay proceedings in this cause pending adjudication of a state court action, and granted defendants leave to amend their responsive pleadings within ten days, so as to assert any counterclaims or defenses presently asserted in the state court action, which they may wish to assert in this case. Said time to amend was subsequently extended by the Court to June 30, 1971.

2. Said defendants wish to assert herein all the counterclaims and defenses presently asserted by them in state court and believe their assertion is essential to a just adjudication of this case. Also, the defendants believe that the situation of both the federal and state courts proceeding on the subject is not in the interest of justice and it has serious adverse effects on federal-state relations and on the due process rights of defendants, as set forth in the Fifth Amendment to the U. S. Constitution, and, therefore, defendants have on the 25th day of June, 1971, filed an appeal from said interlocutory order of June 10, 1971, to the U. S. Court of Appeals of the Eighth Circuit.

3. Defendants have filed their amended pleadings, as above set forth, together with the filing of this motion. Defendants state, however, that to require them to proceed further in this case, prior to the determination of their appeal, would have the effect of prejudging that

appeal and of depriving them of said appeal, without a hearing of it on its merits by the U. S. Court of Appeals.

4. Inasmuch as said appeal has the potential of further defining the proper roles of the state and federal court systems at the earliest possible date, and since needless friction with state policy may be thereby avoided, defendants state that it would be a loss to all concerned with the administration of justice should this appeal be in effect denied, due to further proceedings in this case, prior to the determination of said appeal by the U. S. Court of Appeals.

5. The Court's order on June 10, 1971, quotes from pages 2109-10 of Moore's Federal Practice, Vol. 1A, a source suggested to the Court by plaintiff in a memorandum filed on the day of oral argument, and not within the time prescribed by the Court's rules. Defendants state that it was unfortunate that such a quotation was urged on the Court at said time, because said quotation is not from any case, but merely represents that textbook writer's view, and said view is clearly in conflict with the U. S. Supreme Court's decision quoted on pps. 2107 and 2108 of said textbook, to wit:

l.c. 2107-2108—Chief Justice Vinson for the Court:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the fed-

eral courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts . . .

"As this Court held in Great Lakes Dredge & Dock Co. v. Huffman: 'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.' "

While the Supreme Court in said quotation is speaking specifically of not enjoining the state court, the Supreme Court is saying that if the federal court does not enjoin the state court, then the federal court will not proceed, but will stay itself and allow the state court to proceed. The situation in this case is more serious, for, as this Court has found, plaintiff does not seek to stay the state court proceeding, but this Court is nonetheless proceeding on the same subject that the state court is proceeding on. We respectfully state that this is not a very forthright way of dealing with the state courts.

Defendants believe the due process argument is one of first impression, and it is made in light of the U. S. Su-

preme Court's statements on abstention, as contained in England v. La. Board of Medical Examiners and quoted previously by defendants.

WHEREFORE, defendants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, pray the Court to stay further proceedings in this Court, until their appeal has been determined by the U. S. Court of Appeals.

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Hadley P. Stonner

In the United States District Court for the
Eastern District of Missouri
Eastern Division

The Northern Trust Company, as Trustee,
Plaintiff,
vs.
Robert I. Clausen, et al.,
Defendants.
} Cause No. 71 C 76 (3).

REPLY BRIEF OF PLAINTIFF TO DEFENDANTS' MOTION TO STAY WHILE APPEAL IS PENDING

The Northern Trust Company, as Trustee, plaintiff herein, opposes the Motion to Stay While Appeal is Pending filed by defendants Robert I. Claussen, H. B. Surkamp and Hadley P. Stonner for the following reasons:

1. On June 10, 1971, this Court overruled the Motion of said defendants to stay this cause pending adjudication of an action filed by them in the Circuit Court of Boone County, Missouri.

2. On June 23, 1971, this Court overruled the Motion of said defendants for rehearing of said Motion to Stay Proceedings.

3. On June 25, 1971 said defendants filed a Notice of Appeal from the Interlocutory Order of this Court entered on June 10, 1971.

4. Plaintiff believes that the Court of Appeals for the Eighth Circuit has no jurisdiction over this appeal and has filed a Motion to Dismiss the Appeal with said court. A copy of said Motion to Dismiss is attached hereto and incorporated by reference.

5. 28 U.S.C., § 1292(b) specifically provides that the application for an appeal shall not stay proceedings in the District Court unless the District Court or the Court of Appeals shall so order.

6. Plaintiff believes that this Motion is not filed in good faith but only to thwart and interfere with plaintiff's right to have this entire cause disposed of on July 26, 1971.

Respectfully submitted

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611 Olive Street
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231-5833
Attorneys for the Northern
Trust Company

In the United States District Court for the
Eastern District of Missouri
Eastern Division

(Caption Omitted)

REPLY BRIEF OF DEFENDANTS RE THEIR MOTION TO STAY WHILE APPEAL IS PENDING

Come now the defendants Robert I. Claussen, H. B. Surkamp and Hadley P. Stonner, and, for their reply brief in support of their Motion to Stay While Appeal is Pending, state to the Court that:

1. Plaintiff's reply brief re said motion argues that the U. S. Court of Appeals for the Eighth Circuit does not have jurisdiction of defendants' appeal. Such is not a proper argument to be made to this Court, as the U. S.

Court of Appeals will be the judge of whether or not it has jurisdiction.

2. So that this Court may be fully advised, the defendants state that their appeal is pursuant to 28 U.S.C. 1292 (a)(1).

3. The last case cited in the most recent supplement to 28 U.S.C.A. 1292 (a) (1) note 121 is Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304 (1967), and at l.c. 307 and 308, the U. S. Court of Appeals for the Second Circuit quotes the U. S. Supreme Court's decision in Baltimore Contractors v. Bodinger, 75 S.Ct. 249, and concludes by saying:

> "'And, we agree with the Fifth Circuit that the rules that has emerged from the many decisions is that 'An order staying or refusing to stay proceedings in the District Court is appealable under §1292 (a) (1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; **and** (B) the stay was sought to permit the prior determination of some **equitable** defense or counterclaim.' Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), cert. denied 371 U.S. 891, 83 S.Ct. 190, 9 L.Ed2d 124 (1962) (emphasis in original)."

Defendants' appeal meets both those requirements.

4. The U. S. Supreme Court in Baltimore Contractors v. Bodinger, supra, reviewed the legislative history on interlocutory appeals as follows, l.c. 252:

> "'The provision for interlocutory appeals was first introduced in 1891, when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat. 826. Section 7 of that Act allowed appeals from interlocutory orders in equity 'granting or continu-

ing' injunctions, but for those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of §1292 in its present form.

"No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable consequences."

In connection therewith we recall Chief Justice Vinson's ruling for the Court in Alabama Public Service Co. v. Southern Ry. Co., 71 S.Ct. 726, quoted in defendants' Motion to Stay While Appeal is Pending, as to how serious and important the Court regards the avoidance of "needless friction with the state courts".

The developing law on contempt cases seems to recognize that it would be better for a Court, other than the Court involved, to pass on serious matters in that area; and we believe that the same holds true in this case, that it would be better for the U. S. Court of Appeals to pass on the matter, when the course of action being taken by the District Court does involve the serious matter of federal and state court relations.

Respectfully submitted

J. WARD DRISCOLL
JAMES C. BUTCHER and
CLARENCE W. HAWK
By J. WARD DRISCOLL
Attorneys for Defendants

United States Court of Appeals
for the Eighth Circuit

The Northern Trust Company, as Trustee, Appellee, vs. Robert I. Clausen, H. B. Surkamp, and Hadley P. Stonner, Appellants.	No. 71-1366.

MOTION TO DISMISS

Comes now The Northern Trust Company, as Trustee, appellee herein, and moves this Court to dismiss this Appeal for the reason that this Appeal is not within the jurisdiction of this Court. In support whereof, appellee respectfully states that:

1. On June 10, 1971, the District Court entered an interlocutory order overruling the motion of appellants to stay all proceedings in said action.

2. On or about June 25, 1971, appellants filed their Notice of Appeal from said interlocutory order of the District Court.

3. This Court has no jurisdiction over this appeal under the provisions of 28 U.S.C., § 1291 inasmuch as the appeal is not from a final decision of a district court.

4. This Court has no jurisdiction over this appeal under the provisions of 28 U.S.C., § 1292(a) inasmuch as the interlocutory order appealed from is not the type of order specified by Subsection (a) of 28 U.S.C., § 1292.

5. This Court has no jurisdiction over this appeal under the provisions of 28 U.S.C., § 1292(b) inasmuch as the

interlocutory order appealed from does not contain a statement prescribed by 28 U.S.C., § 1292(b).

Respectfully submitted

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231-5833
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United States Court of Appeals
for the Eighth Circuit

(Caption omitted)

APPELLANTS' RESPONSE TO MOTION TO DISMISS

Come now the appellants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner, and, for their response in opposition to appellee's Motion to Dismiss for lack of jurisdiction in this Court, appellants state to the Court that:

1. Their appeal from the interlocutory order of June 10, 1971, of the District Court refusing to stay proceedings in the District Court, until cause No. 52930 of the Circuit Court of Boone County, Missouri, is finally adjudicated, is pursuant to 28 U.S.C. 1292 (a) (1).

2. The last case cited in the most recent supplement to 28 U.S.C.A. 1292 (a) (1) note 121 is Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304 (1967), and at l.c. 307 and 308, the U.S. Court of Appeals for the Second

Circuit quotes the U.S. Supreme Court's decision in Baltimore Contractors v. Bodinger, 75 S.Ct. 249, and concludes by saying:

> "And, we agree with the Fifth Circuit that the rule that has emerged from the many decisions is that 'An order staying or refusing to stay proceedings in the District Court is appealable under No. 1292 (a) (1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law: **and** (B) the stay was sought to permit the prior determination of some **equitable** defense or counterclaim.' Jackson Brewing Co. v. Clarke, 303 F.2d 844, 845 (5th Cir.), cert. denied 371 U.S. 894, 83 S.Ct. 190, 9 L.Ed.2d 124 (1962) (emphasis in original)."

Appellants' appeal meets both those requirements. The suit in District Court seeks to assess a deficiency judgment against the appellants based upon a purported sale on December 14, 1970, by a trustee under a deed of trust on appellants' real estate in Boone County, Missouri. The validity of that purported sale, at which the appellee, who is the holder of said deed of trust, purportedly bought said real estate, and at which the trustee conducting said sale was a member of the law firm representing appellee then and now, is presently being adjudicated in a proceeding in equity, brought by appellants against appellee, said cause being No. 52930 of the Circuit Court of Boone County, Missouri. A copy of Plaintiffs' Third Amended Petition in said case is attached hereto and hereby made a part hereof. Plaintiffs' Second Amended Petition in said case is attached hereto as an exhibit attached to appellants' Motion to Stay Proceedings in the District Court.

It is appropriate and proper that the validity of said purported sale be adjudicated in said cause in the Circuit Court of Boone County, Missouri, since said cause in-

volves title to real estate in Boone County, Missouri, and involves the foreclosure laws of the State of Missouri, and the issues before said court of the State of Missouri do not involve the Constitution, treaties or laws of the United States. Further, following said purported sale on December 14, 1970, the appellee attempted to sell said property to Gene Schultz of Boone County, Missouri, and, therefore, recourse to said state court was immediately necessary to adjudicate title to said real estate, before more purported transfers of said real estate were made. The District Court has found that appellee does not seek to stay the state court proceeding.

3. The U. S. Supreme Court in Baltimore Contractors v. Bodinger, supra, reviewed the legislative history on interlocutory appeals as follows, l.c. 252:

> "The provision for interlocutory appeals was first introduced in 1891, when the circuit courts of appeals were established as intermediate appellate courts. 26 Stat. 826. Section 7 of that Act allowed appeals from interlocutory orders in equity 'granting or continuing' injunctions, but for those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of No. 1292 in its present form.
>
> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences."

In Alabama Public Service Co. v. Southern Ry. Co., 71 S.Ct. 762, Chief Justice Vinson, in his opinion for the Court, set forth how serious and important the Court regards the avoidance of "needless friction with the state courts":

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts . . .

"As this Court held in Great Lakes Dredge & Dock Co. v. Huffman: 'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

" 'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.' "

While the Supreme Court in said quotation is speaking specifically of not enjoining the state court, the Supreme Court is saying that if the federal court does not enjoin

the state court, then the federal court will not proceed, but will stay itself and allow the state court to proceed. The situation in this case is more serious, for, as the District Court has found, appellee does not seek to stay the state court proceeding, but the District Court is nonetheless proceeding on the same subject that the state court is proceeding on.

The developing law on contempt cases seems to recognize that it would be better for a Court, other than the Court involved, to pass on serious matters in that area; and appellants believe that the same holds true in this case, that it would be better for the U. S. Court of Appeals to pass on the matter, when the course of action being taken by the District Court does involve the serious matter of federal and state court relations.

4. The appellants have stated to the District Court, and restate here, that they believe the situation of both the federal and state courts proceeding on the subject is not in the interest of justice and it has serious adverse effects on federal-state court relations and on the due process rights of appellants, as set forth in the Fifth Amendment to the U. S. Constitution.

The appellants also stated to the District Court, and restate here, that their ground for stating that said order of June 10, 1971, is in violation of the Fifth Amendment to the U. S. Constitution is based on the following:

(1) Appellee's petition seeks to impose on appellants a deficiency judgment based on a purported trustee's sale on December 14, 1970, and the validity of that sale, and, therefore, the basis of the federal court action, is the matter being determined by the state court.

(2) The District Court's findings mention that appellee does not seek to stay the state court action

and the Court's findings recognize that the issue in the state court involves state law and does not involve the Constitution, treaties or laws of the United States.

(3) The U. S. Supreme Court in England v. Louisiana State Board of Medical Examiners, 84 S.Ct. 461 (1964), has stated that the doctrine of abstention is a recognition of the state court's particular competency in such matters, to wit:

> "Abstention is a judge-fashioned vehicle for according deference to the 'respective competence of the state and federal court systems.'
>
> "Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

(4) Therefore, to deny abstention under the circumstances is to impose on appellants a determination of that issue by a tribunal recognized as not the most competent to decide that matter, and, therefore, is a denial to appellants of the due process of law, guaranteed to them by the Fifth Amendment to the U. S. Constitution.

5. Pending the printing of designated portions of the record, appellants have, for convenience sake, attached hereto copies of the following pleadings and orders (in the District Court, if not otherwise specified): (1) Appellants' Motion to Stay Proceedings with attached exhibit (Plaintiffs' Second Amended Petition in state court) and Statement in Support; (2) Appellee's statement in opposition; (3) District Court order of June 10, 1971; (4) Appellants' Motion for Rehearing; (5) District Court order of June 23, 1971, denying a rehearing; (6) Memorandum of defendants, other than appellants, stating that they do not oppose appellants' Motion to Stay Proceedings; (7)

Appellee's Complaint; (8) Plaintiffs' Third Amended Petition in state court.

6. On July 15, 1971, appellants received in the mail appellee's Motion to Affirm, which was filed with this Court on July 14, 1971. Said motion indicates that appellee has abandoned its argument as to lack of jurisdiction and now seeks the Court to exercise its jurisdiction. Appellants will file a separate Response to appellee's latest motion within the time proscribed by Rule 8 of the U. S. Court of Appeals for the Eighth Circuit.

WHEREFORE, appellants pray that appellee's Motion to Dismiss be denied.

J. WARD DRISCOLL
25 South Bemiston
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863-3387
Attorney for Appellants, Robert I. Clausen, H. B. Surkamp and Hadley P. Stonner

United States Court of Appeals
For the Eighth Circuit

No. 71-1366 September Term, 1970

The Northern Trust Company, as Trustee,

Appellee,

vs.

Robert I. Clausen, H. B. Surkamp,

Appellants,

R. G. Surkamp,
Hadley P. Stonner, Appellant and
Rolland J. Walters.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT

On consideration of the motion of appellee to dismiss appeal in this cause and to affirm the interlocutory order of the District Court and response of appellant,

It is now here ordered by this Court that the motion of appellee to affirm be, and it is hereby, denied.

And it is further ordered and adjudged by this Court that the motion of appellee to dismiss appeal from the United States District Court for the Eastern District of Missouri be, and is hereby, granted and the appeal in this cause is dismissed. Mandate to issue forthwith.

July 23, 1971

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AUG 26 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-188

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF CASE

On February 15, 1971, following a foreclosure sale of the real estate given as security, Respondent sued Petitioners and others in the District Court for the balance due on a promissory note (Appendix, p. A-1).

Thereafter, Petitioners instituted cause No. 52,930 in the Circuit Court for Boone County, Missouri, to set aside

the foreclosure sale. This suit is now "pending" on a Third Amended Petition (Appendix, p. A-20).

On May 18, 1971, Petitioners filed a Motion to Stay Proceedings in the District Court until the state action was finally adjudicated (Appendix, p. A-3). In denying the Motion to Stay, the District Court found that the state action raised no novel questions of Missouri law (Appendix, p. A-14) and that the issues asserted by Petitioners in Cause No. 52,930 could have been raised as a counterclaim in the federal case (Appendix, p. A-19). Accordingly, Petitioners were granted leave to amend their Answers "so as to assert any counterclaims or defenses presently asserted in the state court action which they may wish to assert in this case" (Appendix, p. A-15).

The judgment of the Court of Appeals for the Eighth Circuit here involved was rendered after Petitioners had filed amended pleadings in the federal action incorporating in that case "their state court defenses and counterclaims" (Petition, p. 14).

ARGUMENT

There are no special or important reasons asserted by Petitioners to suggest that this Court in the exercise of sound discretion should review the judgment of the Court of Appeals of the Eighth Circuit.

The order of the District Court in refusing to stay the proceedings before it was clearly correct. **County of Allegheny v. Frank Mashuda Company**, 360 U. S. 185, 3 L. ed 2d 1163, 79 S. Ct. 1060, (1959).

The Judgment of the Eighth Circuit Court of Appeals dismissing the appeal from this discretionary order, after Petitioners had amended their pleadings and introduced into the federal case all issues sought to be raised by them in the state action, was equally well founded.

The considerations governing review on certiorari set forth in Supreme Court Rule 19 are not present in this case.

CONCLUSION

For the above reasons, Respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-188

ROBERT I. CLAUSEN, H. B. SURKAMP and HADLEY P. STONNER,
Petitioners,

vs.

THE NORTHERN TRUST COMPANY, as Trustee,
Respondent.

REPLY BRIEF OF PETITIONERS

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The last paragraph on p. 2 and the third paragraph on p. 3 of the Brief for Respondent in Opposition seem intended to convey the impression that the order of the Court of Appeals for the Eighth Circuit in dismissing petitioners' appeal for lack of jurisdiction was related to petitioners' filing amended pleadings in the District Court, as described on pp. 13-16 of the Petition for Writ of Certiorari.

Respondent first filed in the Court of Appeals a Motion to Dismiss petitioners' appeal for lack of jurisdiction. Respondent later filed in the Court of Appeals a Motion to Affirm, which is included hereafter in Additional Appendix, and in said Motion to Affirm respondent argued that "the questions presented to review are so insubstantial as not to need further argument" and that "as a result of the filing of appellants' Answer and Counterclaim in Cause No. 71 C 76 (3) the arguments asserted by appellants in their Motion to Stay all Proceedings are now moot."

The Court of Appeals denied respondent's Motion to Affirm, at the same time it was granting respondent's Motion to Dismiss for lack of jurisdiction. As mentioned in the last paragraph of its memorandum in opposition to the Motion to Dismiss, p. A-46, petitioners noted the receiving of the Motion to Affirm and noted that they would file a separate response to it; however, the Court of Appeals proceeded to deny said Motion to Affirm, prior to petitioners filing their memorandum in opposition to said Motion to Affirm.

As can be seen in pp. 13-16 of the Petition for Writ of Certiorari, the petitioners have consistently sought to have the proceedings in the federal court stayed, pending the final adjudication of the matter of state law in the state court, and petitioners have appealed to the Court of Appeals to stay the proceedings in the District Court, upon the District Court's refusing to do so, and, when the Court of Appeals dismissed the appeal for lack of jurisdiction, petitioners filed their Petition for Writ of Certiorari with this Court to review that dismissal. The issue before the District Court is not moot, for as petitioners have stated both in their Motion for Rehearing of their Motion to Stay Proceedings and in their Motion to Stay While Appeal is Pending: "The situation of both the federal and state courts proceeding on the subject is not in

the interest of justice and it has serious adverse effects on federal-state relations and is a violation of defendants' (petitioners') rights to due process of law, as guaranteed to them by the Fifth Amendment to the U. S. Constitution."

In their Petition for Writ of Certiorari, petitioners state that the order of the Court of Appeals for the Eighth Circuit in dismissing their appeal for lack of jurisdiction is in conflict with at least the Second, Fifth and Tenth Circuit Courts of Appeals and with the Supreme Court. Respondent's brief offers no cases or arguments in opposition thereto, but merely cites the case of County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959), which is not on the subject of the jurisdiction of the Court of Appeals on such an appeal, but is offered by respondent to show that "the order of the District Court in refusing to stay the proceeding before it was clearly correct", p. 3 of respondent's brief.

The Allegheny case does not contain the elements in this case, for instance, there is no action by the plaintiff in the Allegheny case comparable to the action of the plaintiff (respondent) in this case, whereby it might be argued, as petitioners have argued herein, that respondent by its actions subsequent to its filing of the federal suit, has, analogous to the England v. Louisiana State Board of Medical Examiners, supra, case, "abandoned" its claim to having the federal District Court determine the matter of state law or respondent has neutralized its claim to federal jurisdiction based on diversity, and, under the circumstances, the District Court must abstain in the public interest to avoid needless friction with the state courts, and, failing to abstain on that basis, the District Court must abstain on the ground that further proceedings would be in violation of petitioners' due process

rights under the Fifth Amendment to the U. S. Constitution.

The Allegheny case must also be read in light of this Court's later decision in England v. Louisiana State Board of Medical Examiners, supra, in which this Court gave great care to the defining and observing of the proper roles of the state and federal courts. Petitioners believe their position, as regards the respective roles of the federal and state courts, is fully in accord with the England decision.

Respectfully submitted

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United States Court of Appeals
For the Eighth Circuit

The Northern Trust Company, as Trustee, Appellee, vs. Robert I. Clausen, H. B. Surkamp, and Hadley P. Stonner, Appellants.	No. 71-1366.

MOTION TO AFFIRM

Comes now The Northern Trust Company, as Trustee, appellee herein, and moves this Court to affirm the interlocutory order of the District Court that is the subject of this appeal upon the grounds that the questions presented for review are so unsubstantial as not to need further argument. In support whereof, appellee respectfully states that:

1. On February 5, 1971, appellee filed Cause No. 71 C 76 (3) in the United States District Court for the Eastern District of Missouri, which is an action for the balance due on a note after foreclosure of the Deed of Trust covering certain real estate securing said note.

2. Subsequently, appellants filed Cause No. 52930 in the Circuit Court of Boone County, Missouri against appellee and others to set aside said foreclosure sale.

3. On May 18, 1971, appellants filed their motion to stay all proceedings in the federal action pending adjudication of proceedings in the state case.

4. On or about June 10, 1971, the District Court entered its interlocutory order denying appellants' motion to stay. In its Order, the District Court granted appellants leave to amend their responsive pleading to assert any counter-

claims or defenses presently asserted in the state court action which they may wish to assert in this case.

5. On June 30, 1971, appellants filed their Answer and Counterclaim in Cause No. 71 C 76 (3), asserting all claims and defenses raised in the state court action.

6. As the District Court stated in its interlocutory order appellants' counsel admits appellants' counterclaim contains "no novel questions of Missouri law" and no issues "which could not be adjudicated in a federal court."

7. As a result of the filing of appellants' Answer and Counterclaim in Cause No. 71 C 76 (3), the arguments asserted by appellants in their Motion to Stay all Proceedings are now moot.

Respectfully submitted

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By /s/ R. R. S.
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Proof of Service

The undersigned certifies that a copy of the foregoing was served upon the attorneys of record for all parties to the above cause by depositing same in an envelope addressed to such attorneys at their address as disclosed by the pleadings of record herein, with postage fully prepaid and by depositing said envelope in a U. S. Post Office mail box in St. Louis, Missouri, on the 14th day of July, 1971.

R. R. S.